

## **Orden jurídico arbitral para el arbitraje comercial internacional: ¿ilusión o realidad?**

Arbitral legal order for international commercial arbitration: illusion or reality?

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COMMERCIAL ARBITRATION:  
ILLUSION OR REALITY?\***

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ARBITRAJE COMERCIAL INTERNACIONAL:  
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**ORDEM JURÍDICA ARBITRAL PARA  
ARBITRAGEM COMERCIAL INTERNACIONAL:  
ILUSÃO OU REALIDADE?**

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**ABSTRACT**

For the last fifty years, international commercial arbitration has become the most proper method of dispute settlement to solve disagreements that may occur in the context of existing contractual relations among international trade operators. To the consolidation of arbitration as its known nowadays, multiple efforts in the theoretical and practical levels have been made in order to give value and a particular meaning to the concept of international commercial arbitration and, by doing so, separate it from what we currently know as national arbitration. The distinctive characteristics of international commercial arbitration against national arbitration suggest that

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nowadays we can talk about an international commercial arbitration legal order completely separated from the State legal order that rules the legal system of a State. Despite the fact that this division has supporters and detractors, it constitutes the base for the confluence of modern notions of private international law that cannot be overlooked in this world that has steered towards the path of globalization.

## KEYWORDS

International commercial arbitration; private law, commercial relations, international law; autonomy of will; commercial agents; mercantile medium; new *lex mercatoria*; offshoring; multilocalization; jurisprudential development; legal order of international commercial arbitration.

## RESUMEN

Durante los últimos cincuenta años, el arbitraje comercial internacional se ha convertido en el método de solución de controversias más idóneo para resolver las diferencias que se pueden presentar en el marco de las relaciones contractuales existentes entre los operadores del comercio internacional. Para la consolidación del arbitraje, tal y como lo conocemos en la actualidad, múltiples esfuerzos a niveles teóricos y prácticos se han realizado con el fin de darle un valor y un significado específico a la noción de arbitraje comercial internacional, y de esta manera diferenciarlo de lo que hoy conocemos como arbitraje nacional. Las características propias del arbitraje comercial internacional, frente al arbitraje nacional, hacen pensar que hoy podemos hablar de un orden legal del arbitraje comercial internacional, separado completamente del orden legal estatal que rige el sistema legal de un Estado. Pese a que esta noción tiene defensores y detractores, se constituye en la base para la confluencia de nociones modernas de derecho internacional privado que no pueden ser desconocidas, en este mundo que se ha encaminado hacia la ruta de la globalización.

## PALABRAS CLAVES

Arbitraje comercial internacional; derecho privado; relaciones comerciales; derecho internacional; autonomía de la voluntad; agentes comerciales; medio mercantil; nueva *lex mercatoria*; deslocalización; multilocalización;

desarrollo jurisprudencial; orden legal del arbitraje comercial internacional.

## RESUMO

Durante os últimos cinquenta anos, a arbitragem comercial internacional tornou-se o método de solução mais adequada para resolver as diferenças que possam surgir no âmbito das relações contratuais entre operadores de disputas comerciais internacionais existentes. Para a consolidação da arbitragem, tal como conhecemos hoje, múltiplos esforços em níveis teóricos e práticos foram feitos a fim de dar um valor e um significado específico para a noção de arbitragem comercial internacional, e, assim, diferenciá-lo de o que conhecemos hoje como arbitragem nacional. As características de arbitragem comercial internacional, contra a arbitragem nacional, sugerem que hoje podemos falar de uma ordem jurídica da arbitragem comercial internacional, completamente separado da ordem jurídica do Estado que regula o sistema jurídico de um Estado. Apesar de esta noção tem apoiantes e detractores, constitui a base para a confluência de noções modernas de direito internacional privado que não pode ser ignorado neste mundo voltado para o caminho da globalização.

## PALAVRAS-CHAVE

Arbitragem comercial internacional, direito privado, relações comerciais, direito internacionais, autonomia da vontade, agentes comerciais, meio comercial, nova *lex mercatória*, offshoring, multilocalização, desenvolvimento jurisprudencial, ordem jurídica de arbitragem comercial internacional. .

## INTRODUCTION

International arbitration has growing in importance for the past 50 years, principally for international business contracts, but also for international investment law and public international law<sup>1</sup>. This article will focus on

1. Talero Rueda, Santiago. *Arbitraje Comercial Internacional*. Editorial Temis. Bogotá, 2008. Page. 1-2. Related to this issue, Professor Talero Rueda in his book wrote: "It has been argued that arbitration is the primary mechanism by which companies has, for the resolution of conflicts arising between them by reason or in connection with their relationships from the international trade of goods or services. The consolidation of the arbitration mechanism within the framework of international trade is due to the gradual acceptance of the various industrialized states. This

international commercial arbitration as an Alternative Dispute Resolution (ADR) method for international business contracts.

This ADR resolution method is now widely used in all international contracts<sup>2</sup>. But behind the arbitration clause in the contracts, there is an extensive analysis which receives influences not only from the international doctrine but also by the country of origin of the arbitrators and in the way they allocate arbitral awards. Nowadays, it is very easy to find differences between international arbitration and national arbitration systems, depending of the country, for example Colombian or France national arbitration has different rules for national and international arbitration<sup>3</sup>. One interesting topic that is always subject of analysis, when the difference between national and international arbitration is done, is the attachment of the arbitration clause and the award to a specific jurisdiction<sup>4</sup>. For national arbitration, this is not a big issue because the procedural rules clearly establish the requirements of an arbitration that permits

to be considered as national<sup>5</sup>. Each country defines the rules independently with, in some cases, an influence of foreign countries treatment of national arbitration. This is usually possible thanks to international legal practitioners who work in different legal systems and who advice the legislative branch of their home countries on how implanting changes. However this is not the same for international arbitration. Important studies started to demonstrate that international arbitration begins to have its own identity, and this identity allows to start saying that it exist an arbitral legal order for international arbitration<sup>6</sup>.

This article will try to demonstrate the existence of the arbitral legal order for international arbitration by showing some particularities in international commercial arbitration. This article aims to analyze the main aspects of the procedure and the arbitration clause, determine if international arbitration must be attached or not to a specific jurisdiction, finally if it is possible to talk about the existence of an arbitral legal order for international arbitration and international arbitration law<sup>7</sup>.

Firstly, the analysis of the relationship between international arbitration and the existence of a legal order for international arbitration is going to be done<sup>8</sup>. The idea of the obligation of the

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*has to be translated into legislative recognition of the cardinal tenets of arbitration, such as private autonomy, the doctrine of separation of the arbitration agreement against the contract and the principle of legal assistance, among others, which give the arbitral mechanisms of a autonomous with respect to litigation*”.

2. Talero Rueda, Santiago. *Opcit.* Page 4: “The revival of international trade facilitated the development of new businesses; the increasing complexity resulted in a permanent resource to arbitration by the companies, which required courts made up of people versed in the matters on which their disputes relapsed. In other words, the slowness of the judicial authorities in resolving conflicts and in action of the laws to the new commercial realities, made palpable urgency to offer companies the possibility that private third parties knowingly and sufficient expertise, resolved their conflicts”.

3. For the Colombian case see: Silva-Romero, Eduardo, *Breves observaciones sobre los métodos de definición del contrato de arbitraje “internacional” in El Contrato de Arbitraje. Compilation made by Eduardo Silva Romero and Fabricio Mantilla Espinosa. Editorial Legis, Bogota, 2008. Page 41: “Colombian law on arbitration is no exception. Article 1 of Act 315 of 1996 on the “international arbitration”, now compiled in Article 196 of Decree 1818 of 1998 by which issues the status of alternative mechanisms of conflict resolution (hereinafter the “Decree 1818) following more or less closely the disputes in article 1 (3) of the Model Law, also incurs the confusion of using the expression of international arbitration. Since July 2012, a new Law compiles the rules for national and international arbitration in Colombia (Act 1563 of 2012).*

4. Gaillard, Emmanuel. *Aspects philosophiques du droit de l’arbitrage international. Editorial Martinus Nijhoff Publishers. Leiden/Boston. 2007. Page 33: “Opposition sought by some scholars of private international law between a territorial connection and a connection contract has the same failure. Gradation is sometimes made between the most territorialist visions and those who see arbitration in terms of autonomy”.*

5. For the Colombian case see Bejarano Guzman, Ramiro. *El Procedimiento Arbitral Colombiano in El Contrato de Arbitraje. Opcit. Page 620: “The Decree 1818 of 1998 is the regulatory status of the rules on arbitration in Colombia, because it abridged all legislation before dispatch was scattered. That is, the aforementioned decree met in a single legal Decree 2279 of 1989 and the provisions on arbitration were contained in Act 23 of 1991, Decree 2651 of 1991 and law 80 of 1993, 270 of 1996, 315 of 1996 and 446 of 1998”. Now all these legislation efforts are compiled in the Act 1563 of 2012.*

6. Gaillard, Emmanuel. *Opcit.* Page 44-45: “International harmony solutions can actually only result from the adoption in all states, identical legislation on arbitration and, most importantly, the uniform application of solutions and retained by the courts of each State. Despite efforts at the international level to achieve such harmonization, realism command to see that the rights of arbitration and more the spirit of national courts in respect of arbitration remain very different. It is this very situation that gives an interest in determining the applicable law

7. Gaillard, Emmanuel. *Ibid.* Page 18-19: “The question of sources - if the source, for some fundamental norm, rule of recognition for others - is probably one of the most difficult of the philosophy of law, arbitration should be considered a privileged terrain of this reflection. While this is more or less its ability to resolve the question of sources of positive law that are considered in fertility or impotence of any theory of law, arbitration should not be indifferent to legal philosophers”.

8. Gaillard, Emmanuel. *Ibid.* Page. 39: “The thesis that the source of the juridical international arbitration could only be found in the legal seat is also expressed in a more subjectivist. It is

nexus between a legal order and the arbitration clause or the award will be confronted to the idea that for international arbitration, this nexus is not necessarily present and now it is more common that the idea of a nexus between several legal orders and the arbitration clause or the award<sup>9</sup>. Finally the analysis of the new treatment of international arbitration will be done, looking at the future of the field in the view of trying to solve the following question: are we facing the consolidation of a law of international arbitration?<sup>10</sup> This structure was mainly worked by Professor Emmanuel Gaillard in his book *Aspect philosophiques du droit de l'arbitrage international*.<sup>11</sup> This book will be used as a guide; however, different approaches will be taken into account for the structure of this academic document.

## 1. INTERNATIONAL ARBITRATION IS ATTACHED TO A JURISDICTION (LOCALIZATION AND MULTILocalIZATION)

### 1.1. Background: Why is this discussion important?

It is important, to begin this journey, starting with a few definitions of what is arbitration, and particularly international arbitration. In words of Professor Charles Jarrosson, arbitration is “a method of settling conflicts whose immemorial origins are lost in the sands of history.”<sup>12</sup> More

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*argued that in determining the seat of arbitration in a particular state the parties or, failing that, the arbitration institution OOU arbitrators have heard placing arbitration under the exclusive sway of the legal of that State.*

9. Mantilla-Serrano, Fernando. *La Autonomía del Derecho del Arbitraje Internacional: ¿Hacia un Arbitraje Realmente Autónomo?* in *Arbitraje Internacional. Tensiones Actuales. Compilation made by Fernando Mantilla-Serrano. Editorial Legis, Bogotá. 2007. Page 207: “The regulation of arbitration is not without the tensions of evolution in a sometimes hostile environment. As an institution and legal tool that is, arbitration requires a regulatory framework that has evolved over the years to recognize autonomy and specificity of form reflected in its construction and permanent practice”.*

10. Mantilla-Serrano, Fernando. *Ibid. Page 208: “The existence of a tension with respect to the autonomy in arbitration is clear finding, on the one hand, the consecration of the autonomy of the regulation of arbitration and, secondly, the emergence of a truly autonomous arbitration, independent even of the autonomous law she now no one seriously questions.*

11. In his English edition: “*Legal Theory of International Arbitration*”. For the purposes of this academic document, the French and original version of the book is going to be used. All the translations are done by me.

12. Translated from: Jarrosson, Charles. *La notion d'arbitrage in*

clearly, the Colombian arbitration law tried to establish a definition of arbitration as follows: “*arbitration is a mechanism by which the parties to a conflict of transigible character, its solution defer to an arbitral tribunal, which is temporarily invested with the power to administer justice, uttering a decision referred to arbitration.*”<sup>13</sup> This definition expressed in a good way the two principal aspects of arbitration; first the contractual aspect and second the judiciary aspect.<sup>14</sup> In the past, several doctrinants try to explain that the origins of arbitrations are attached to one of these aspects, either the contractual argument or either the judiciary one. Nevertheless it is important to say that now the idea of a hybrid notion of arbitration; including both the contractual and the judiciary position is more accepted<sup>15</sup>. And going further professor Jarrosson mentions that “*In conclusion on this point, we must remember that the arbitration is fundamentally a hybrid, but that should not be excessively schematic considering that arbitration is contractual in a first phase and the courts in one second. In fact, the arbitration agreement is original in that it already is to the right to act and all the arbitral process combines, in varying degrees depending on the time, conventional and judicial aspects.*”<sup>16</sup> The previous definitions established two main issues related to the definition of arbitration, the contractual and the judiciary.

Both aspects are taking into account when a philosophical study of arbitration is made. First the contractual basis is analyzed principally in the idea of the consent of the parties, the liberty that the parties have in order to decide to go to arbitration instead of going to a home state jurisdiction.

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*El Contrato de Arbitraje. Opcit. Page 5.*

13. Republic of Colombia. Legislative Branch. Decree 1818 of 1998, Article 115. The Act 1563 of 2012 established a similar definition in its article first: “*Article 1: Definition, modes and principles: arbitration is an alternative dispute resolution mechanism whereby the parties defer to arbitrators the resolution of a controversy related to matters of free disposition or those that the law authorizes.*”

14. Professor Jarrosson explains this distinction using as an example the Colombian Arbitration Law.

15. According to this argument: A. Redfern and M. Hunter in *International Commercial Arbitration, 2<sup>nd</sup> ed., 1991 Sweet and Maxwell. Page 8 said: “It begins as a private agreement between the parties. It continues by way of private proceedings. It ends with an award which has binding legal force and effect and which the courts of most countries of the world will be prepared to recognize and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law”.*

16. Translated from: Jarrosson, Charles. *La notion d'arbitrage in El Contrato de Arbitraje. Opcit Page 9.*



But this is not going to be the main point of this article. The main point about the contractual issue is to analysis the implication of how to explain the attachment of the arbitration clause to a specific jurisdiction. The first approach to this legal notion is made by an international rule of international arbitration that allows the parties to establish that the arbitration clause is going to be ruled by another law different of the law of the contract. In relation to this topic, Professor Christian Larroumet affirms that *"There is a doctrine which claims that from the time the arbitration clause is autonomous in relation to the contract which is, it may be subject to a state or international law other than the law governing the main contract."*<sup>17</sup> Professor Larroumet introduced in this paper that to the arbitration clause it can be applied a different law that the law applied to the main contract.

### 1.2. The links with a sole jurisdiction, a nationality for international arbitration?

The notion that the arbitration clause must be attached to a specific jurisdiction is a theory that is applicable in several jurisdictions all over the world. Professor Larroumet introduced the case of France as follows: *"The French Code of Civil Procedure contains no provision on the law applicable to international arbitration agreement, but that was not an obstacle to submit the agreement to arbitrate the common law of international contracts, because the arbitration agreement is a contract. As we know, in all legal systems of the world, the arbitration agreement is subject to a law that dictates its conditions of validity and its effects."*<sup>18</sup> With this initial approach it is easy to see that apparently the law of a state defines what and what is not international arbitration<sup>19</sup>. Then the legal issue is to define

to which legal system the arbitration clause (it must be always understood as talking about the arbitration contract) is attached to. One of the approaches proposed by doctrine is the *lex arbitri*. About this idea, *"because the language of international commercial arbitration has been created mainly in Europe and the United States, the term "place of arbitration" is without doubt one of the components of the language of international commercial arbitration least understood in Latin America. In this expression, created under the influence of a conventionalist theory of language, in Latin America is interpreted according to the directives of a linguistic theory realistic. In our continent, in particular, and because of the influence of the judicial and arbitration procedure, the legal profession (lawyers, judges, arbitrators, lawyers, etc.), it is wrongly attributed to him an order meaning "space" or "territory"*<sup>20</sup>. This physical approach (*lex arbitri* as an office) is confronted to a judicial approach, not taking into account the territory in which the arbitration is going to be arbitrated but related to the legal link with the country's legal system. Professor Silva Romero describes 2 consequences of this legal approach to a specific legal system, a state legal system, for an international arbitration (*lex arbitri*). The two consequences are: *"First, fixing the place of arbitration determines (i) the place where the arbitral award shall be considered issued and, therefore, (ii) the competent court to hear the motion to vacate that may attempt against such an award."*<sup>21</sup> Now these consequences have to be studied, and it is possible to see that the choice of one legal system is in a first place to define the law of the arbitration clause, and second, to define the law that will rule the annulment action. At the end, the question will be: An arbitration award must have a nationality? This discussion has important significance in the arbitration world. There are important doctrinants that defend the argument that an arbitration award must be attached to one legal system in a contradiction to the idea that international arbitration has no forum. About this notion, Professor Thomas Clay started saying: *"Certainly in private international law the notion of "jurisdiction" means a location state, ie, the idea of the endowment by the State and therefore respect for the law enforcement or this office procedure. Here the notion of "jurisdiction" is confused with that of "home". But if the referee is actually an office, he is not invested*

17. Translated from: Larroumet, Christian. *A propósito de la naturaleza contractual del acuerdo de arbitraje en materia internacional y de su autonomía in El Contrato de Arbitraje. Opcit. Page 17*

18. Translated from: Larroumet, Christian. *La notion d'arbitrage. Ibid. Page. 19*

19. Professor Eduardo Silva Romero described the difference between national and international arbitration: *"So, when the law, jurisprudence and doctrine used the terms "domestic arbitration" and "international arbitration", they really mean (but may relate within the limits of language) to controversies of national and controversies of international order. Silva Romero, Eduardo. Observaciones sobre los métodos de definición del contrato de arbitraje "internacional". In El contrato de Arbitraje. Opcit. Page. 41*

20. Translated from: Silva-Romero, Eduardo. *Ibid. Page. 44*

21. Translated from: Silva Romero, Eduardo: *Ibid Page. 45.*

by the State in which the headquarters is located, and he is not obliged to respect the laws of police procedure or that place. As described by French author *Matthieu de Boisseson*: "The courts have been dematerialized. He has, in some way, moved from one physical space, ie a territory, into a symbolic space, that the consent of the parties. "The charter is therefore treated as the basis for the investiture: where the state invests the judge, the will of the parties invests the arbitrator"<sup>22</sup>. Professor Clay showed here the philosophical notion of the attachment of the arbitration clause to a legal system. As discussed in the introduction, the philosophical discussion started with power that the parties give to the arbitrator, instead of a power given by a particular state. This notion is vital for international arbitration and for the further development of the study of these notions. Professor Clay, in a way to complement the consequences presented by Mr. Silva Romero, wrote about specific concerns of the localization of an international arbitration: "First consequence: first is the dispute over the interim and conservatory to the place of arbitration has certain interests. They know they can be useful for the parties before the arbitral tribunal, or during the course of the procedural stage to claim provisional or conservatory measures. Therefore, the judge may order such measures, and this is normally the judge found in the place of arbitration."<sup>23</sup> The importance of the choice of a specific jurisdiction relates to the possibility for the tribunal to seek into the judge of the seat of the arbitration<sup>24</sup>. There is a discussion related to the lack of imperium of arbitrators, not only in an international arbitration but also in a national arbitration. This discussion brings again philosophical issues that permeate the study of arbitration and mainly the discussion is the contrast between the state justice and private justice.

22. Translated from: Clay, Thomas. *La importancia de la sede del arbitraje en el arbitraje internacional: ¿es todavía relevante? In Arbitraje Internacional. Tensiones Actuales. Opcit. Page. 195*

23. Translated from: Clay, Thomas. *Ibid. Page. 196.*

24. About this concern, Professor Gary Born mentioned: "Arbitrators lack the authority, under virtually all national legal regimes, coercively to enforce their orders. "The most important and obvious such difference [ between court-ordered and tribunal-ordered provisional measures ] is that orders given by arbitrators are not self-executing, like those of courts, and must generally take the form of directions to the parties to perform or refrain from performing certain acts." (Citation of Schwartz, *The practices and Experience of the ICC Court, in ICC, Conservatory and Provisional Measures in International Arbitration 59, 1993*). Accordingly, if a part refuses to comply with tribunal-ordered provisional measures, judicial enforcement may be essential to effectuating those measures, judicial enforcement may be essential to effectuating those measures. In Born, Gary, *International Commercial Arbitration. Editorial Wolters Kluwer Law & Business. Aspen Publishers. New York City, 2011. Page. 839.*

Is this a valid confrontation? Is it necessary to be analyzed? The answers to both questions are affirmative. But this cannot be the only issue that may determine if it is necessary for an international arbitration to be settled in a specific jurisdiction or in a specific legal system. This discussion must serve to give strong basis to arbitration and establish that the reason for the existence of this alternative method of dispute resolution is fully founded from any theoretical and practical point of view. Shortly it may be interesting to see the approach of this discussion in the Colombian legal system. The concept in Colombia of arbitration, both national and international, establishes that the arbitrators are private judges (exposed in A) it was clear the discussion about the nature of arbitration, if it is a contract or a procedure, concluding that finally it is a hybrid). According to this, "unlike other alternative dispute resolution in Colombia arbitration is a private mechanism to administer justice, alternatively and indirect, by which the parties involved in a conflict, character transigible differ adjudication to an arbitral tribunal. That is, it replaces the court and a possible direct reconciliation, through an agent outside third parties called "arbitral jurisdiction." This authority serves as a judge and his decisions, known as arbitration awards are equivalent to judgments. However, despite their similarities the two justice mechanisms have their differences in both form and substance."<sup>25</sup> In Colombia the situation is particular because, as explained by Professor Molina, private justice is taking into account by the Colombian Constitution in article 116<sup>26</sup>, creating in a certain way a "private jurisdiction"<sup>27</sup> This can create a problem related

25. Translated from Molina, Carlos Mario. *Aspectos constitucionales del arbitraje en Colombia. In El Contrato de Arbitraje. Opcit. Page 57.*

26. Republic of Colombia. *Political Constitution. Article 116: "The Constitutional Court, the Supreme Court, the State Council, the Council of the Judiciary, the Attorney General's Office, Courts and Judges, administer justice. So does the military justice system. The Congress will exercise certain judicial functions. Exceptionally, the law may assign jurisdiction of specific subject to certain administrative authorities. However not be allowed to forward the case file and prosecute crimes. Individuals may be temporarily invested with the function of administering justice in the condition of juries in criminal cases, conciliators or arbitrators authorized by the parties to utter failure at law or in equity, in the manner prescribed by law. Now in the new Act 1563 of 2012, the annulment procedure for international arbitration is established in article 107.*

27. In Professor Molina's words: "Since the early twentieth century it has been established by case law and the Colombian doctrine arbitrators are private law judges with public law functions, previously established by law They behave as judges when applied through a process preset, similar to judicial due

to the attachment of an international arbitration to the Colombia jurisdiction and the protection given by the Constitution. The attachment to a sole jurisdiction, in this case, the Colombian, can be a problem for the parties, having account that a constitutional protection action such as the "acción de tutela"<sup>28</sup> (action for protection) may be used to contest the arbitration award, even if it is international. This is different of the annulment action established in the article 40 of the Act 1563 of 2012.<sup>29</sup> The Colombian example is given here to show how important can be the discussion in a specific jurisdiction and how the choice, considering the first consequence exposed by professor Clay, of a jurisdiction or a legal system can be important. This is also seen in the second consequence proposed by Professor Clay.<sup>30</sup> In the third and fourth consequences,<sup>31</sup>

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*process standards, such as the opportunity they give to the parties for the defense of the evidence, according to terms and guarantees of procedural law". Aspectos constitucionales del arbitraje en Colombia. In El Contrato de Arbitraje. Opcit. Page 59*

28. Republic of Colombia, Executive Branch. Decree 2591 of 1991. Art. 1: "Everyone is entitled to claim protection action before the courts at any time and place, through a preferential and summary, by itself or anyone acting on its behalf, the immediate protection of their fundamental constitutional rights, when they want to prove that these violated by the act or omission of any public or private in the cases indicated the decree. All times are working days and to bring the action of tutela"

29. Republic of Colombia. Executive Branch. Act 1563 of 2012. Article. 40: "Article 40. Extraordinary appeal for annulment. The extraordinary appeal for annulment is filed against the arbitration award, which must be submitted in a duly substantiated manner, before the arbitral tribunal, indicating the grounds invoked, within thirty (30) days following its notification or that of the ruling correction on its clarification, correction or addition. The court secretary will be transferred to the other party for fifteen (15) days without the need for an order. Upon expiration, within five (5) days thereafter, the clerk of the court shall send the writings presented along with the file to the competent judicial authority to hear the appeal.

30. "Second consequence: judge's determination of support. This can be of great importance as the place where the arbitral tribunal is. You can therefore imagine that the judge of support is the main result in choosing the place of arbitration. It is known that, in the words of Professor Philippe Fouchard, the arbitral tribunal is the real "Achilles heel of the arbitration." That is why most national laws provide that the judge in the place of arbitration may alleviate the difficulties encountered by the arbitral tribunal. For example, French law requires support the judge intervenes when "the arbitration takes place in France" or when the parties have chosen the French law of procedure (Article 1493 NCPC). Similar provisions are found in Belgian law, Dutch, Italian, etc." Clay, Thomas, Opcit. Page 196-197

31. "Third consequence: The fact of making an action for annulment. In the same manner as provided for in French law, the legislation establishes that the seat of the arbitral tribunal has handed down the award is the place which should be tried for annulment (Article 1504 NCPC). This system, established in 1982, broke the other hand with the previous case law, which denied the annulment of awards that they had no point of connection to France even though they had been uttered in France." And "finally, the fourth consequence: the development of anti-suit

Professor Clay comes to the conclusion that: "In summary, the four points that have been exposed, we can deduce that the place of arbitration has primarily an interest in the relationship that the arbitral tribunal may have with state jurisdiction, whether of the judge concerned to take measures provisional or conservatory, the judge in support of the court before which advances the action for annulment or even the judge who makes the anti-suit injunction decision. (...) But it is a good method of reasoning from the malfunctioning of a procedure being used, it is better from what works to wonder if the place of arbitration actually still retains a utility."<sup>32</sup> As showed by Professor Clay, even if the four consequences exposed that apparently it is necessary to have an attachment with a jurisdiction, the practice and theory of international arbitration propose the elements to debate this legal argument as it will be exposed in the second part. But meanwhile, it is important to see a little bit further how this attachment is defended. For this, Professor Gaillard presents in his book several authors and their postulates related to the defense of the attachment of international arbitration to a sole jurisdiction, postulates argued from a philosophical point of view<sup>33</sup>. The objectivist position prevails for the comparison between the arbitrator and the judge of the seat of the arbitration. This objectivist position is defined by Professor Gaillard as: "There exist, in each State's legal order, a plurality of jurisdictions, including the referees would be included. Thus, in France, the referee is sided with the High Court, Commercial Court and the rent tribunal rural"<sup>34</sup>. This extreme theory tried to ignore in a certain way the existence of an international arbitration, different from national arbitration. With this argument, the defenders of the objectivist theory wanted to manifest that arbitration will always

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*injunctions, which are also called anti-arbitration appeals. We know that more and more often the case that state jurisdictions attempt to interrupt arbitration by injunctions to advance this type of procedure. Such decisions are called anti-suit injunctions are taken in most cases in the country in which the seat of the arbitral tribunal. The seat on this measure may cause certain consequences." Clay Thomas, Opcit. Pages. 197-198.*

32. Translated from Clay, Thomas. Opcit. Page 199.

33. Gaillard, Emmanuel. Opcit. Page 35: "To justify the reduction of the arbitral process to a component of the legal seat of the arbitration, we advance two arguments which, from a purely logical point of view, should be mutually exclusive but are often involved in the writings of authors. There is indeed an objectivist and subjectivist current of the vision of the arbitration the arbitrator makes the body of the legal seat.

34. Translated from: Gaillard, Emmanuel. Ibid. Page 36.



be attached to a jurisdiction, the same to say that the award and the arbitrator will always have a nationality<sup>35</sup>. In the other side, but always defending the argument of the sole jurisdiction is the subjectivist position. This position “is to argue that fixing the seat of arbitration in a particular state the parties or, failing that, the institution of arbitration or arbitrators heard placing arbitration under the exclusive sway of the legal System State.”<sup>36</sup> This argument has been defended by several authors like MM. Poudret et Besson, as explained by Professor Gaillard<sup>37</sup>. One of the most important doctrinants of arbitration, Professor Bruno Oppetit, made his own analysis of this position. He affirmed that: “In international matters, arbitration may have more in common with a country, which creates a conflict of laws and involves, in principle, finding the applicable law: made the determination of applicable law, arbitration will be “renationalised” and thus usually found inserted in the legal state, between the connecting factors are usually given preference to the place of the award.”<sup>38</sup>As showed, this theory has been well defended by several doctrinants along the last decades. However, another interpretation, as it will be exposed next, to the attachment of international arbitration to a sole jurisdiction has also been developed.

### 1.3. The multilocalization theory:

Multilocalization primarily means the notion of the attachment not to only one but to several jurisdictions configures the second vision that is going to be studied in this part of the academic

document.<sup>39</sup>Professor Jan Paulsson calls this vision the pluralistic thesis<sup>40</sup>. According to this thesis, he explained it using the following example “Consider the case of an arbitration taking place in country A. An award is rendered there. Assume the courts of that country reserve the power to overrule an arbitral tribunal if they find a simple error of law and that there is thus a possibility of appeal. Most countries’ judicial systems, whether by the operation of multilateral conventions or by unilaterally applied principles of comity, are prepared to enforce a foreign arbitral award only if satisfied that the award is ‘binding’. The law of A will naturally have rules to determine whether an award rendered in A is binding. That law may hold an award not to be binding until it has resisted appeal (or unless no appeal has been lodged within a certain period). Yet nothing would prevent country B from legislating – and acting upon – a rule that an award by an arbitral tribunal constituted according to contractual agreement, wherever rendered, is binding for the purpose of enforcement in B at the moment it is pronounced”<sup>41</sup>. This example shows the complexity of international arbitration related to the enforcement of the award. In one country (A for the example) the award may be not enforced but in a country B the award accomplishes with all the requirements and is enforceable even if in A it was not. The 1958 – *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the “New York Convention) has unquestionably helped to create an arbitral legal order for international arbitration since arbitration is now the primary adjudication system for international commercial disputes.<sup>42</sup> However, many legal

35. Gaillard, Emmanuel quoting F.A. Mann “*Lex Facit Arbitrum*”, *International Arbitration. Liber Amicorum for Martin Domke, La Haye, Martinus Nijhoff, 1967, Page 159* reproduced in *Arbitration International, 1986: “The phrase is a misnomer. In the legal sense no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.” Page 38.*

36. Translated from: Gaillard, Emmanuel. *Ibid.* Page 39.

37. These authors mentioned, in words of Professor Gaillard, that: “The concept of *lex arbitri* is here conceived as equivalent, for the referees, the *lex fori* of the State Court. The relationship between arbitration and the legal seat is as dependent more on the desire of the parties that the course material arbitrage transactions. It nevertheless establishes an exclusive link between each arbitration and a single legal order, single source of its legal character, and this link will be later the premise of any express or implied reasoning regarding the arbitration proceedings, the law applicable to the substance or the fate of the particular sentence to intervene.” *Ibid.* Page 40.

38. Translated from: Oppetit, Bruno. *Teoría del Arbitraje. (original title Théorie de l’arbitraje)* Editorial Legis, 2006. Page. 190.

39. In words of Professor Gaillard: “From this perspective, “multilocalisatrice” while the other was “monolocalisatrice”, the right seat of the arbitration, but not completely eliminated, is not one right among others. It is no longer the exclusive source of power to judge referees. All rights may come into contact with the arbitration in question have an equal role to rule on the validity of the award, those places with a possible title run at least as hard to do as the place of workflow arbitration”. Page 46-47.

40. Paulsson, Jan. *Arbitration in three dimensions* in [http://www.lse.ac.uk/collections/law/wps/WPS2010-02\\_Paulsson.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf). Page 4.

41. Paulsson, Jan. *Ibid.* Page 8.

42. *Uncitral*: [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html) (discussing the 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the “New York” Convention). (last visited Nov. 9<sup>th</sup> 2011). See also Yves Dezalay & Bryant G. Garth, *Dealing in virtue: International Commercial Arbitration and The construction of A Transnational Legal Order*, Book Review by John Flood, 8 *Social & Legal Studies* 601-603 (1999) (discussing the construction of a new transnational legal order for international business commercial dispute resolution).

systems in developing nations such as the Chinese legal system are experiencing serious corruption problems.<sup>43</sup> Therefore, it is important to stress the practical importance that “even though a state (as jurisdictional authority) like China is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (New York Convention), other issues such as the local government enforcement issues make these types of treaties moot in those instances.”<sup>44</sup>

Professor Paulsson manifests that: “The pluralistic thesis is perhaps most precisely described as the perception that a multiplicity of legal orders may ensure the efficacy of arbitration. This insight may not lead to tidiness and predictability. But the vision of an unknown set of potentially relevant legal orders does correspond to the reality of international life”<sup>45</sup>. Related to this matter, Professor Gaillard mentioned that this phenomenon want to justify that several legal systems are able to accept or even more said to recognized an arbitration award, legal systems that are not the seat of the arbitration.<sup>46</sup> From a philosophical point of view, Professor Gaillard explains that this multilocalization theory is supported by the “state positivism posture”<sup>47</sup> and by the “westphalian model”<sup>48</sup>. As a conclusion, the doctrinant made a critical analysis, and he affirms that: “the vocation of all equal rights which recognize the validity of the award to ensure its legal validity cannot be understood from the cumulative application of all laws having a connection with the arbitration, which would result

*in defavorem arbitrandum, by applying the most restrictive standard. The vocation of all state laws likely to be affected to apply does not mean that each taken alone, can prevail over all others. In the Westphalian representation of the arbitration, each State has a way to impose its conception of what constitutes a trade worthy of legal sanction in the confines of its own legal.”*<sup>49</sup>. Interesting point of view exposed also by Professor Jan Paulsson when he mentioned that finally, “Like so much of life, this pluralism may be chaotic. Depending on the international features of a particular case, the potential plurality is infinitely variable. It is not defined *ex ante*. True, many cases involve no factors extraneous to the national setting. But in the end, the potential legal orders that may be called upon to make arbitration effective in any given case will not have been finally identified until the arbitrants have finally lain down their arms”<sup>50</sup>. As a conclusion, it is a fact that none of the arguments is strong enough to beat the other. There is a coexistence of both visions that are defending, as exposed in this first part, by doctrinants from all over the world. However, there is now a third vision that is analyzed and has become an important subject in international arbitration: Are we facing the creation of an international commercial arbitration law? Is the phenomenon of the delocalization of international arbitration taking another step?

## 2. FACING THE CHALLENGE OF THE CONSOLIDATION OF AN INTERNATIONAL ARBITRATION LAW

### 2.1. After the multilocalization, the idea of the delocalization of international arbitration:

The previous part of this academic document presented the most discussed arguments related to the study of the relationship of international arbitration with the law of the seat of the arbitration, the law chosen by the autonomy of the will or in the plurality thesis, the attachment to several national legal systems. But as it is going to be presented in these lines, these are not the only arguments. Professor Oppetit made an exposition of the discussion, opposing the phenomenon of localization against the phenomenon of

43. John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L. L., 329, 381 (2006).

44. John H. Matheson, *Ibid.* Page 379.

45. Paulsson, Jan. *Ibid.* Page 10.

46. In words of Professor Gaillard: “The second representation of international arbitration is the one that finds the source of the legal validity of the award not only in the legal order of the seat, but in all legal systems ready to certain conditions, to recognize the effectiveness of the award. Page 46.

47. About the state positivism posture see Gaillard, Emmanuel, *Ibid.* Page 50: “The thesis of denying the legal validity of the arbitration decision in terms of the subsequent recognition of the effectiveness of the award is no more convincing than that which would be to claim that an obligation has no legal status in all cases where the debtor does not expect its assets seized in court to discharge his debt”.

48. Related to the westphalien model, see Gaillard, Emmanuel, *Ibid.* Page 55: “In a Westphalian model, the least we can expect states that reserve, within the limits conservatively set by international instruments such as the New York Convention, to exercise this right, as each is concerned, a control arbitral awards is not to try to impose their vision of the arbitration to other states, equally sovereign”.

49. Translated from: Gaillard, Emmanuel. *Opcit.* Page 60.

50. Paulsson, Jan. *Opcit.* Page 10.

delocalization as follows: “However, this location tends to lose its importance in modern law, and, in general, is devoid of all mandatory. In France, international arbitration is largely “denationalized.” Furthermore, it is considered that an international arbitral tribunal has no forum, which, in principle, all mandatory link between the law of the State in which to exercise its functions”<sup>51</sup>. The idea that Professor Oppetit introduced here is that **international arbitration** can have different characteristics only presented for this figure (instead of national arbitration). This idea, that international arbitration has no forum, is one of the main points of discussion not only for doctrine but also in jurisprudence, evidently, national jurisprudence having account that there is not an international court exclusively for international commercial arbitration<sup>52</sup>. As presented here, we have two ways of looking the phenomenon, the first one is the procedural approach, analyzing how the arbitration award is going to be enforced in a specific country different from the arbitration forum, and a contractual approach<sup>53</sup> looking for the liberty of the parties particularly in international commercial arbitration, as mentioned by Professor Talero Rueda<sup>54</sup>. Let’s have a look first to the contractual approach. Professor Mantilla-Serrano explained this argument in two points, points that are in fact punctual characteristics of international arbitration. These points are the Specificity and the Favorability of arbitration. For the specificity, the author affirms that: “Today, it is accepted that arbitration is a separate institution deserves, as has been observed in this comment, a

specific regulation. The most important effect of this is that, as reflected in the vast majority of new laws on arbitration, this regulation is sufficient and gives rise to an independent procedure where the analogy with legal proceedings does not belong, even as a secondary source of interpretation, unless the law itself provides otherwise, however, this location tends to lose its importance in modern law, and, in general, is devoid of all mandatory. In France, international arbitration is largely “denationalized.” Furthermore, it is considered that an international arbitral tribunal has no forum, which, in principle, all mandatory link between the law of the State in which to exercise its functions”<sup>55</sup>. About the favorability, Professor Mantilla-Serrano wants to show that the rules related to international commercial arbitration must be always applied in the most favored way possible<sup>56</sup>, having account two important principles: the principle of availability<sup>57</sup> and the principle of the “lowest common denominator.”<sup>58</sup> The idea of the doctrinant is to give live to international commercial arbitration by its own, without depending of any legal system, referring here to the contractual approach. This idea is defended as well by Professor Grigera Naón who wrote: “It can be concluded, then, that the regulatory regime, both autonomous and heteronomous, international commercial arbitration is oriented, in general, to promote and protect self-regulatory features of international commercial arbitration, including the strong autonomy granted to parties and alternative referees to determine eligibility or the substantive nature of legal rules governing the dispute submitted to arbitration”<sup>59</sup>.

51. Translated from: Oppetit, Bruno. *Opcit.* Page 190.

52. Introducing the discussion, Professor Talero Rueda affirms that: “however, the theory of offshoring question the relevance attributed to the place or place of arbitration. This theory, originally formulated by some French doctrinaires states that international commercial arbitration is a process of self, in which the parties have unlimited scope to provide for a procedure applicable to the arbitral process to dispense with the mandatory procedural rules of venue”. Talero-Rueda, Santiago. *Opcit* Page 268.

53. As mentioned by Professor Grigera Naón: “In international commercial arbitration in the case of regulations or law governing the substance of the dispute, it is understood that value to be respected the autonomy in the selection of applicable law, under the guiding principle that informs, in terms overall, both the legal framework for international contracts, such as international commercial arbitration”. Page 608.

54. Talero Rueda, Santiago *Ibid.* Page 268. “Therefore, the final award is a simple manifestation or extension of the autonomy of the parties, reason, neither he nor the process that generates the issue of the award, are subject, in the opinion of the supporters of the theory, the control of the courts of the place where arbitration has advanced the process, which, in the absence of theory, exercise the respective control in those events in which one party decides to institute an action for annulment”.

Talking now about the judiciary point of view, Professor Gaillard, this third representation is focused to be a separate way of the monolocalization and the multilocalization. For

55. Mantilla-Serrano, Fernando. *Opcit.* Page 212.

56. See Mantilla Serrano, Fernando. *Ibid.* Page 213-214.

57. Mantilla Serrano, Fernando. *Ibid.* Page 214: “Corollary of private autonomy is the “freedom of agreements” and “free contract agreements”, ie, the possibility that individuals have to do anything that is not expressly prohibited”.

58. Explaining this principle, the author mentioned that: “Thus appears a lowest common denominator that permeates more or less similar across national regulation or international arbitration and has the indirect effect contribute to the regulation of arbitration, far from being extensive bodies of law, whether contained in relatively shallow texts that are limited to consecrate the elements and principles, leaving the regulations as will the parties responsible for more detailed provisions. *Ibid.* Page

59. Translated from: Grigera Naón, Horacio A. *Opcit.* Page 609

the author, it is possible of an arbitral judicial order (or system). In the words of Professor Gaillard "It is the strong perception among arbitrators of international trade they do not make justice on behalf of any State, but they carry no less a judicial function to serve the international community"<sup>60</sup>. As it is showed here, he considers that the notions of monolocalization and multilocalization can be contested thanks to the work of the arbitrators<sup>61</sup>. Related to the philosophical analysis, the author centers the arbitral legal system in the iusnaturalist current<sup>62</sup> and the so called transnational positivism<sup>63</sup>. From these two philosophical arguments, Professor Gaillard arrives to the conclusion that they are some transnational rules that can be able to govern international arbitration. And for define the application of these rules, it is going to be used a new conception of the conflict of laws theory, which "also shows the dynamic nature of the method of transnational rules which breaks with the static view of the conflict of laws that favor the application of the classical method of

conflict."<sup>64</sup> To prove that this notion is now well accepted in the international arbitration world, Professor Gaillard made an analysis of various national cases but also by arbitration awards. This means that both arbitral jurisprudence and state jurisprudence would be accepting the implementation of an international arbitration legal system. From the examples of international arbitration jurisprudence, the author affirms that it is the way in which an international arbitrator acts that configures the elements that allow thinking in the existence of an international arbitration legal system<sup>65</sup>. These rules are the international arbitration awards, the application of comparative law, the treaties and the principles of international law<sup>66</sup>. But what is about the right of enforcement of the states? For this question, the answer is giving with the understanding that there is no opposition between the labor of the states to enforce the awards and the consideration that we are in the presence of an international arbitration legal system<sup>67</sup>. As a second way to demonstrate the presence of this legal system, it is the development made by the state courts, represented in a group of cases addressing this issue. As exposed by Professor Mantilla-Serrano, the French Cour de Cassation has been one of the state courts that made more deep analysis related to this issue. Related to the arbitral procedure, the French Cour de Cassation decided, in the case *État d'Israël c. National Iranian Oil Company*<sup>68</sup> that the French Courts were able to act as "juge d'appui" for the constitution of the arbitration tribunal, even if in the arbitration clause the nomination institution charged of the election of

60. Translated from: Gaillard, Emmanuel. *Opcit.* Page 60.

61. Related to the labor of arbitrators: "However, in terms of arbitrators, the observation appears to be insufficient, making the Westphalian model essentially unstable. In the presence of conflicting claims of various legal to enter an arbitration given - one claims the valid arbitration agreement, the other null; one claims that the arbitrators do not have the required conditions of impartiality, the other than arbitration should proceed normally - the arbitrators cannot merely find the multiplicity of claims. They must decide between them by a method which can only follow the logic of conflict - with the disadvantage of reducing the corresponding position of an international nature in a domestic situation by linking it to a single legal order, which is characteristic of the method of conflict - or based on the application of substantive rules, probably more likely to respect the international character of the situation and take into consideration the existence of a plurality of legal systems that have expressed a view on what can be considered as a trade worthy of legal protection". Gaillard, Emmanuel, *Ibid.* Page 62.

62. About the iusnaturalist current: "values greater than expected based on the nature of things or of society - and sometimes allowing the solutions to consolidate the positive law in legitimizing and sometimes to challenge them in the hope to develop them - can easily be seen as justification the existence of a higher legal order to legal systems which have no other merit than being organized by sovereign states". Gaillard, Emmanuel. *Ibid.* Page 66.

63. For the transnational positivism: "The notion of legal arbitration reflects the fact that in reality the States broadly agree on the conditions that a trade must meet to be considered a mandatory mode of dispute settlement, the result, the arbitration award, worth receive the sanction of the States. The source of power to judge referees taking the subsequent recognition of the award by States, the prospect remains positivist. No state has a monopoly on this one juridicity, this representation of the arbitration does not accept less than the idea that each legal system state taken separately might result from the convergence of rights". Gaillard, Emmanuel. *Ibid.* Page. 74.

64. Translated from: Gaillard, Emmanuel. *Ibid.* Page 80.

65. Related to this concept: "Even if it is not often expressed as such, the representation that international arbitration is organized into a scheme with all the attributes of a genuine legal system is manifested mainly by the use of the transnational method rules by the arbitrators". Gaillard, Emmanuel. *Ibid.* Page. 83

66. About the rules: "for that set of rules to qualify as a system, it is necessary that these rules are articulated one to the other by processes which form the matter of what the discipline specific legal logic. Chief among these processes include the dialectic of general and special and that the principle and the exception. Gaillard, Emmanuel. *Ibid.* Page. 85

67. "The fact that states have retained the monopoly of enforcement of the award does not diminish the autonomy of the judicial activity of the arbitrators and the order in which they are located, in states that do fact that the police put at the service of the actual execution of the product of arbitral activity they wanted to make the preferred method of settlement of disputes in international trade". Gaillard, Emmanuel, *Ibid.* Page. 92.

68. République Française, Cour de Cassation, Première Chambre Civile. *État d'Israël c. National Iranian Oil Company*. Arrêt du Premier février 2005.



the arbitrators was the ICC<sup>69</sup>. As a conclusion of this, “thus appears that there is an arbitration procedure and is regulated independently of any national law giving the dominant role to the will of the parties, so that once this desire has operated there is no reason to find a legal basis at the national”<sup>70</sup>. From the point of view of the enforcement of the arbitration award, several important cases from the Cour de Cassation<sup>71</sup> and State and Federal Courts in the United States have treated the issue. Related to the French Courts, two main cases make the difference and establish the way of thinking of the Judges related to international arbitration. The most important case is *Hilmarton c. Omnium de Traitement et de Valorisation (OTV)*<sup>72</sup>. In this well known case for the practitioners of international arbitration, the French Courts recognized the validity of an arbitration award that was annulled by the Swiss courts, courts who considered that there was a violation of the Swiss law. The French Court mentioned that “an award rendered in Switzerland was an international award which was not integrated into national law of that State, so that its existence remained determined despite its cancellation and its recognition in France that was not contrary to public international”<sup>73</sup>. According to this position, the French Cour de Cassation proposed a better situation than the article V of the New York Convention. In the United States Court’s point of view, the *Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*<sup>74</sup> exposed the approach of the Federal Courts related to the enforcement of arbitration awards. In this case, the Federal Court recognized and enforced an award that was issued and annulled in Egypt<sup>75</sup>. As seen

some courts are agree with the conception of the existence of an international arbitration order. However, in the following lines we are going to see the critics made to this conceptual idea.

## 2.2. The ambivalence of the system, some critics to this idea:

The study of law permits a confrontation of ideas because in a vast extend of issues there is not a unique answer. The debate is open, and this is not the exception. Sharing Professor Gaillard’s opinion, Professor Grigera Naón defends the labor of the arbitrator in the consolidation of an international arbitration system and he explains that the arbitrator has a responsibility on the preservation of international commercial arbitration as the best way to resolve international commercial controversies<sup>76</sup>. Related to the job of the courts, Professor Gaillard mentions that: “*This shows that, bit by bit, the state legal systems gradually abandon the idea that a sentence necessarily would draw its source in the legal seat designed as a forum, or even in a legal state any, to be closer to one that admits the existence of a legal arbitration*”<sup>77</sup>. The existence of a system proper to international commercial arbitration based principally and the will of the parties and the labor of arbitrators is the main idea defended by these doctrinants<sup>78</sup>. But as presented before, not all the practitioners in the field of international arbitration are agree with this conception. Authors like Professor Talero-Rueda are against of the

69. In words of Professor Mantilla-Serrano: “France acknowledges that just the existence of an arbitration agreement, even without worrying about the procedural rules applicable to it and regardless of the place of arbitration (or lack thereof) for the French judge to give support to extend full effectiveness that agreement”. *Opcit. Page 231.*

70. Translated from: Mantilla-Serrano. Fernando. *Ibid. Page. 231*

71. See *Cour de Cassation, Première Chambre Civile, Société Pabalk Ticaret Sirketi c. Société Norsolor* 9 octobre 1984; *Cour de Cassation, Première Chambre Civile Société Polish Ocean Line c. Société Jolasry*. 10 mars 1993;

72. République Française. Cour de Cassation, Première Chambre Civile. *Hilmarton c. Omnium de Traitement et de Valorisation (OTV)*. Arrêt du 23 mars 1994.

73. République Française, Cour de Cassation Première Chambre Civile. *Hilmarton c. Omnium de Traitement et de Valorisation (OTV)*. Arrêt du 23 mars 1994.

74. *United States of America, Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*, 939 F. Supp. 907. (DDC 1996).

75. About this case: “The Court held that under the principle of favorability of Article VII of the New York Convention award was enforceable under the “Federal Arbitration Act”. The Court also stated that he was obliged to recognize the *res judicata* effect to

the decision to annul the award of the Egyptian court and stated that the parties had given up appeals against the award so that he could not pretend Egyptian Air Force retract of that covenant”. Mantilla-Serrano, Fernando. *Opcit. Page. 234.*

76. Grigera Naón, Horacio A. *Opcit. Page. 612*: “would therefore be considerable part of the role of international referees enlightened, interested in protecting commercial arbitration and its operation consistent with its role has been agreed by the international business world where the institution has its origins and roots deeper and establish guidelines to identify reasonably foreseeable that allow a balance between regulation independently agreed by the parties to govern their relationships, and norms, principles and legal provisions, although not agreed, claiming its application in an effort to protect interests and most common social values”.

77. Translated from: Gaillard, Emmanuel. *Opcit, Page 100.*

78. As Professor Mantilla-Serrano says: “View the different facets of autonomy in the regulation of arbitration does seem to be reaching a universal system that simply check for a meeting of minds and find at least one legal system willing to recognize in its double manifestation: agreement arbitral award, to awaken all the arbitration effective”. *Opcit. Page. 239.* In a moderate form, Bruno Oppetit states that: “belonging of the arbitration to a transnational legal system totally independent of national legal systems remain mythic while enforcement of the arbitral award is subordinate to national judicial control. Therefore, the arbitration is always between autonomy and integration”. *Opcit. Page 195.*

implementation of the theory of the delocalization of international arbitration. For him, “*the arbitral process ‘floats in the sky’; as suggested by proponents of the theory. Although a mechanism of private origin, arbitration legal system requires a reference against which to determine its validity and effectiveness. The autonomy is not unlimited and assistance of the courts is necessary for achieving the legitimate expectations of the same parties*”<sup>79</sup>. According to this, it seems that always the international arbitration clause and the international arbitration award must be connected to at least one jurisdiction. The author doesn’t mention if it must be to the jurisdiction of the seat of the arbitration or to a specific one. Going further to the criticism, Professor Paulsson expressed several concerns about it. The first concern that he mentioned in his work is that the theory of the “*ordre juridique arbitral*” is a concept only explained from the point of view of international commercial arbitration in France<sup>80</sup>. Next the author made several considerations related to the analysis of the theory of the arbitral legal system, mentioning that the system is nothing but a wrong representation of the pluralistic theory (multilocalization)<sup>81</sup>. In addition to that, the other critic made by Professor Paulsson refers to the labor of state legal systems and their courts and the presence of this transnational legal system proposed by the current of professor Gaillard, saying that: “*When Gaillard focuses on the ‘more delicate’ matter of the recognition of the ‘ordre juridique arbitral’, he says that it ‘flows from the will of States, which does not prevent it from being seen as an autonomous legal order – and thus puts his entire construct fatally in harm’s way. For the international legal order of states has been painstakingly (if incompletely) constructed on the basis of unanimity. States have never accepted*

that the norms of the international community are derived from ‘progressive tendencies’ embraced by other states; they insist on their own individual adhesion. They are even less likely to embrace such amorphous norms as limitations on their laws, in their national space, when dealing with a private-law feature like arbitration”<sup>82</sup>. The arguments of these authors show clearly that there is not a unified position around this matter.

## CONCLUSION

This article intended to show the different approaches related to the treatment of the arbitration clause and the enforcement of international arbitration awards. It is possible to see that the international academia recognizes the existence of three main theories (1) monolocalization, 2) multilocalization and 3) delocalization). However, international academia does not agree on the future of the existence of an arbitral legal order for international commercial arbitration. This theoretical debate also has some practical relevance for practitioners, since the debate may be referred to a discussion between legal systems (common law v. civil law), and the considerations about what must be considered as international public policy. But it is clear that the discussion is not over. The idea of the consolidation of an international set of rules for international arbitration such as UNCITRAL arbitration law model or UNIDROIT may be a practical solution that can be adopted by the international community.

79. Translated from: Talero-Rueda, Santiago. *Opcit.* Page 278.

80. See Paulsson, Jan. *Opcit* Page 15: “*The development of international arbitration surely owes a disproportionately large debt to French law and to the conceptual advances of French judges and scholars. Nowhere else have the twin lodestars of freedom and internationalization, combined in the conception of a voluntary process that accommodates the reality of a transnational society, shone so bright.*”<sup>15</sup> Yet, the zeal of those who make extravagant claims may do more harm than the resistance of non-believers and scoffers”.

81. About this concern: “*Above all, even if this French thesis were correct, it is difficult to see how it achieves anything not already available under the pluralistic thesis. If national judicial authorities embrace awards that apply transnational norms or trade practices, there is no warrant for concluding that they thereby acknowledge another ‘legal order’ any more than their acceptance of ‘customs of the diamond trade’ means that they recognize a legal order established in Antwerp. What courts say is quite simply an expression of the legal order of which they are a part; it can be nothing else.*” Paulsson, Jan. *Opcit.* Page. 13

82. Paulsson, Jan. *Ibid.* Page 12-13.

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